IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE,
R.S.O. 1990, c. H.19, as amended, and

IN THE MATTER OF THE COMPLAINT OF Laura J. Cunningham
AGAINST the Royal Canadian Legion Branch 594,
Bill De Hart, and Larry Fairbrother
dated February 15, 1989, alleging
discrimination in employment on the basis of sex.

BETWEEN

LAURA J. CUNNINGHAM,
Complainant,

and

ROYAL CANADIAN LEGION BRANCH 594,
BILL DE HART, and
LARRY FAIRBROTHER,
Respondents,

and

ONTARIO HUMAN RIGHTS COMMISSION,
Commission.

BEFORE: Robert W. Kerr, Chair,
Board of Inquiry

APPEARANCES: Kaye Joachim,
for the Commission.

Laura J. Cunningham,
on her own behalf.

Roland J. Baldassi,
for the Respondents.

DECISION

CHRONOLOGY OF EVENTS

This complaint arose out of events which followed the resignation of George Laforet as chief steward of the bar operation at the premises of the Respondent Royal Canadian Legion Branch 594 at 2635 Talbot Road East in the City of Windsor on September 26, 1988. The person employed to replace Laforet as chief steward was Warren (Ted) Blake. Prior to this, the Complainant and Blake were both employed as full-time stewards in this bar operation. The

Complainant claims that the employment of Blake, rather than herself, to replace Laforet involved discrimination on the ground of sex contrary to sections 5(1) and 9 of the Ontario Human Rights Code.

Here and throughout this decision, for convenience of reference I will cite the provisions of the Code from the Revised Statutes of 1990. Although the events occurred prior to the coming into force of the current Revised Statutes, there has been no change in the wording or law of the Code relevant to this case from that in force in 1988.

The Complainant had been employed by the Respondent Branch 594 since 1974 when she began work as a waitress on part-time basis. While employed as a waitress, she acted as a bar steward on occasion and at some point her employment changed in effect to that of a part-time steward. In 1984 she began full-time employment as a steward with the Respondent Branch 594. Although there is no clear evidence before me as to when his employment began, it appears that Blake was first employed by the Respondent Branch 594 as a full-time steward sometime in 1987.

While the parties are in dispute over critical aspects of what transpired at the time that Blake was employed to replace Laforet as chief steward, there are parts of the chronology on which there was no conflict, at least in the evidence adduced. I will review these events first.

Laforet's resignation was tendered on September 26, 1988. The ultimate authority for hiring decisions by the Respondent Branch 594 resided with the Executive Committee which had a meeting planned for other reasons on September 27. The Executive Committee considered the filling of the vacancy created by Laforet's resignation at this meeting and gave instructions on how to proceed to the Respondents De Hart and Fairbrother. The relevant actions of the Respondents De Hart and Fairbrother after this meeting were based on decisions taken at the meeting, or their interpretation thereof.

The Executive Committee at the time included the Respondent De Hart as President and the Respondent Fairbrother as 2nd Vice-President. The Respondent Fairbrother was also Chair of the Bar Committee which played a certain supervisory role over the bar operation. The remainder of the voting membership of the Executive Committee consisted of a Past President, Cliff Capnerhurst; a 1st Vice-President, Reg Hinchcliffe; a 3rd Vice-President, Doreen Capnerhurst; and a Secretary, Grenville Dable.

After the Executive Committee meeting, the Respondent Fairbrother called one of the part-time stewards, Katherine O'Keefe (now Borges), to ask if she was interested in employment as a full-time steward since the resignation of Laforet created a vacancy in the

complement of full-time stewards. She asked for time to check the availability of baby-sitting so that she could be available on a full-time basis.

During this conversation, O'Keefe was advised by Fairbrother that the position of chief steward was to be discussed with Blake. There was a dispute over whether this information was volunteered or given in response to a question from O'Keefe, but this would not seem to affect the significance of the information.

The Respondents De Hart and Fairbrother proceeded to meet with Blake, who had begun his shift for the day, to discuss the filling of the vacancy in the chief steward's position. In the meantime, O'Keefe telephoned the Complainant and told her that Laforet had resigned and that Blake would be taking his place.

The Complainant then put in a telephone call to the Respondent Fairbrother at the Respondent Branch 594's premises. The call was received at or near the beginning of the meeting with Blake. It was answered by the Respondent De Hart who called the Respondent Fairbrother to the telephone in response to the Complainant's request to speak to the latter.

The Complainant asked the Respondent Fairbrother whether Blake was to be employed as the chief steward. He responded that they were speaking to Blake at that moment. During this telephone conversation, the Complainant advised the Respondent Fairbrother that she would not be reporting for work on her shift later that day and that she was resigning. The Complainant did not inquire about the reasons why Blake, rather than she, was being approached at this stage.

The next day the Respondents De Hart and Fairbrother went to the home of Laforet to see if he wished to take a leave of absence instead of resigning. He declined this offer. The Respondent Fairbrother also telephoned the Complainant. He asked if she would reconsider her resignation. She was advised that, if not, they would be replacing her. She reiterated that she was resigning. The Respondent Fairbrother then contacted another part-time steward, Susan Poonia, and offered her a position as full-time steward.

It appears that the employment of Blake as chief steward was finalized on September 29. At some point, O'Keefe and Poonia accepted the offers of employment as full-time stewards. The Complainant spoke to the Respondent De Hart about a week after her resignation and asked if she could return to work. She was told that her position had been filled and she could not return.

EVENTS IN DISPUTE

Other aspects of what transpired during these events were the subject of conflicting evidence. Not surprisingly, the conflicts went largely to matters relevant to the reasons why Blake, rather than the Complainant, was employed as chief steward to replace Laforet. It is these reasons that determine whether there was a violation of the Human Rights Code.

O'Keefe testified that the Respondent Fairbrother told her Blake was to be employed because they needed a man for the job. The Complainant testified that the Respondent Fairbrother told her that Blake was being hired because of the heavy lifting involved in the job. The Respondent Fairbrother denied both of these allegations.

The Respondents De Hart and Fairbrother, and the 3rd Vice-President at the time, Doreen Capnerhurst, testified that no hiring decision had been made at the Executive Committee meeting of September 27. Rather Blake and the Complainant were both to be approached concerning the position, and the offer of a leave of absence was to be made to Laforet. Thus, there had been no decision, nor does it appear much consideration, at this meeting as to the relative merits of the Complainant and Blake.

According to these witnesses, it was the failure of the Complainant to report for work that evening, when the position of chief steward was to be discussed with her, and her precipitous resignation, that prevented further consideration of her as a candidate for the position. This left Blake as the only viable candidate, since the only other alternative would be to advertise for the position.

My conclusion is that an effective decision was taken at the Executive Committee meeting of September 27 to hire Blake as chief steward if he would accept the position. This was also subject to the question of whether Laforet would take a leave of absence, in which event presumably the appointment as chief steward might be on an interim basis pending Laforet's return.

I reach this conclusion for several reasons. First, if it was indeed the intention to consider both the Complainant and Blake, there is no explanation why this was not communicated to O'Keefe when she was advised that Blake was being approached concerning the position. The evidence of both O'Keefe and the Respondent Fairbrother indicates that only Blake was mentioned in this connection.

I also find it difficult to understand why the fact, if it was a fact, that the Complainant was under consideration was not communicated to her when she called the Respondent Fairbrother on September 27. While he explained this on the basis of unwillingness to raise the question of promotion under the threat of a resignation, it does appear that the first question the Complainant asked was whether Blake was to get the position. If her candidacy was under consideration at the time on an equal

footing with Blake, it does not make any sense for the Respondent Fairbrother to have withheld this information at the outset of the conversation before she resigned.

Moreover, even if the Respondent Fairbrother felt under pressure during this conversation, it is hard to understand why there was no effort to set the record straight when the Complainant was called the next day to try to persuade her to return to work. Even if her reaction had already given the Respondents De Hart and Fairbrother severe reservations about proceeding with any Executive Committee instruction to discuss the chief steward position with her, a clearing of the air seemed called for if she was to be persuaded to return. After all, there was no assurance that, if the Executive Committee had indeed directed equal consideration of Blake and the Complainant, someone else would not reveal this. This would surely create an embarrassment to the Respondents De Hart and Fairbrother for having withheld this information from the Complainant.

There is also the fact that hiring authority rested with the Executive Committee. I find it puzzling why there is no evidence of any effort to get further instructions from this body in the circumstances if it had indeed directed that both the Complainant and Blake be considered. The appointment of Blake appears to have proceeded forthwith after it was confirmed that Laforet's resignation was final. This strongly supports the conclusion that the original authority was to proceed with this appointment, not to return to the Executive Committee for a further decision.

Another factor supporting this conclusion is that, in posted and published explanations of these events by the Respondent Fairbrother to the membership of the Respondent Branch 594, there was no mention of any plan to consider the Complainant and the forestalling of this by her resignation. This seems highly relevant information for the purpose of clarifying events.

Further, during the participation of the Respondents in the proceedings under the Human Rights Code prior to the hearing before me, they appear to have maintained the position that the Complainant was not considered primarily because of a known reluctance to perform one part of the job of chief steward, that is, the picking up of sundry supplies for the bar and kitchen. There was no indication that she had been under active consideration for the position until she resigned. If the Complainant had still been under consideration until she resigned, it is baffling why it was not mentioned sooner in the proceedings pursuant to the human rights complaint.

If there was a sense in which the Complainant was still under consideration for the position, I conclude that it was only in the event that Blake declined. This, I presume, was the basis for the testimony of the Respondents' witnesses that both Blake and the Complainant were to be considered.

BASIS OF THE EFFECTIVE DECISION

Having concluded that the effective decision to hire Blake was already made on September 27, this brings me to the question of whether the reasons for that decision involved discrimination contrary to the Human Rights Code.

The disputed allegations that the Respondent Fairbrother told O'Keefe and the Complainant respectively that a man was wanted for the job, and that heavy lifting was a consideration, could comprise direct evidence of discrimination. Such statements suggest a stereotypical view of gender roles blatantly inconsistent with the Human Rights Code. On the other hand, there is the denial of such statements by the Respondent Fairbrother.

I find it hard to evaluate the evidence around these alleged statements. The testimony of the Complainant and O'Keefe was unequivocal, but the statements in question are so stereotypical that they could easily be the product of creative memory. Since they are so blatantly indicative of sex discrimination, I am puzzled why the Complainant did not raise this issue immediately with the Respondents, particularly since her resignation indicates clearly that she was not ready to acquiesce in perceived injustice. There is no evidence, however, that she raised any question of gender discrimination around the time of her resignation.

On the other hand, while the Respondent Fairbrother did actually deny making the statements, much of his evidence on this point was more in the nature of an argument that it would have made no sense for him to say such things. To this extent, I found his evidence diversionary. The question is not whether such discriminatory statements make sense or not, or whether he realizes this. The question is whether he made such statements on September 27, 1988, since, if he did, that would reflect candidly on what influenced the decision of the Executive Committee that day.

In the final analysis I am not persuaded on the balance of probabilities that these statements were made. This makes it necessary to rely on circumstantial evidence to determine what influenced the decision at the September 27 meeting.

Several factors that might have affected the decision were suggested by the evidence of the Respondents' witnesses. First, there was an expressed unwillingness of the Complainant to pick up sundry supplies as Laforet had been doing. Secondly, there was a tendency of the Complainant to act in a manner which is best indicated by her nickname among her co-workers, that is, "Mouthy". Finally, there was a suggestion that the Complainant had contributed greatly to the sense of stress that caused Laforet to resign.

Any or all of these could have been non-discriminatory factors supporting a decision not to promote the Complainant, as long as gender was not also a factor. The question of whether I would find these a sufficient explanation to offset any inference of discrimination does not arise, however, since it was the evidence of the Respondents' witnesses that no decision based on any of these factors took place that day. These were mentioned instead as factors that might have been raised if the Executive Committee later had reached consideration of the merits of whether to promote the Complainant to chief steward.

Since I see no reason to doubt this testimony, I find that an effective decision was made on September 27 to hire Blake as the chief steward, but that there was no decision at that time on the merits of the Complainant as a candidate for the position. In other words, the decision with respect to the Complainant was essentially to leave her out of consideration until it was determined whether Laforet might take a leave of absence in lieu of resigning and whether Blake would take the position.

In the result, there is really no evidence what actually influenced the decision to offer the position to Blake and leave the Complainant out of consideration. This obviously makes it very difficult to determine whether sex was one factor affecting that decision.

In determining whether there is reason to believe sex was a factor, an obvious starting point is the general hiring policy of the Respondent Branch. While there was no clearly established policy other than that decisions were made by the Executive Committee, it does appear that normal hiring practice involved word-of-mouth recruiting, member recommendation, and hiring from within.

Given this general practice, the Complainant, as the only other remaining full-time steward in addition to Blake, was obviously in the pool of potential candidates for the position. Thus, the making of a decision on September 27, 1988 to prefer Blake without consideration of the merits of the Complainant as a candidate leads me to the conclusion that this decision must have involved some sort of preliminary assessment, perhaps largely unspoken, of Blake and the Complainant.

Since the Respondent Branch 594 had no established criteria for the selection of chief steward, it is again difficult to determine what might have been considered relevant for the purpose of such a preliminary assessment. The evidence does suggest three factors that at least some of those involved in the decision probably took into account. First, there was seniority. Secondly, there was the matter of ability to perform the job. Thirdly, there was the question of willingness to carry out the work expected of the chief steward.

On the question of seniority, the qualification of the Complainant was definitely higher than that of Blake. There was no evidence as to either the ability or willingness of Blake to perform the job, except in so far as the decision to hire indicates he was considered qualified in both respects. The lack of such evidence makes it impossible for me to attempt any comparison between Blake and the Complainant in terms of these factors. On the other hand, the evidence does indicate that the performance of the Complainant as full-time steward was satisfactory, but for one small incident that did not appear to have been regarded as critical.

There was a question around the Complainant's willingness to perform the duty of picking up sundry supplies, even if this did not entail full consideration of the merits of the candidates as already discussed. It appears common knowledge that the Complainant took exception to the performance of this type of work by the chief steward. At the same time, there is evidence of the Respondent's witnesses that the Complainant had contributed to causing Laforet to resign by actions which showed ambition to take over his job. This indicates a willingness to perform on the part of the Complainant and knowledge of this by the Respondents. It may be that this same evidence also suggests antipathy towards the Complainant for having put stress on Laforet, but no one claimed this as an explanation for the decision to prefer Blake.

Overall what little exists in the way of evidence of relevant qualifications for the purpose of the type of preliminary assessment that must have been made at the September 27 meeting suggests that the Complainant was at least equal to Blake, if not superior in light of her seniority. There is really no explanation of why, in these circumstances, the initial decision was made, as I have found, to prefer Blake and put aside consideration of the Complainant.

Gender was, however, an obvious difference between Blake and the Complainant. Lacking any other adequate explanation, I find it more probable than not, that is, on the balance of probabilities, that sex did play some role in the decision to prefer Blake and leave the Complainant out of consideration. Since this was the effective decision that led to the hiring of Blake as chief steward, this constituted a violation of the rights of the Complainant under ss. 5(1) and 9 of the Human Rights Code, whatever may have happened as to her resignation later that day and her refusal to reconsider the next day.

This conclusion is reinforced by another aspect of the hiring actions which flowed from the decision of the meeting of September 27, 1988. In explaining why the hiring of Blake proceeded without further authorization following the resignation of the Complainant, the Respondents De Hart and Fairbrother stated that the resignation left them with no alternative, unless they went to external advertising.

While a reluctance to advertise externally is obviously in line with the hiring practices already noted, the view that external advertising was the only alternative to hiring Blake is revealing, given those same practices. In filling the two full-time steward vacancies resulting from the resignations of Laforet and the Complainant, the Respondents De Hart and Fairbrother, consistently with normal practice, offered the positions to two part-time stewards. Presumably these were the two individuals thought most qualified for and deserving of these positions.

What is revealing is that both of these persons were also women. Surely the normal practice of internal hiring was still an alternative if Blake was not hired but, given what happened in filling the two full-time positions, the prime candidates in this pool appear to have been women. Thus, the view that external advertising was the only alternative to hiring Blake indicates a reluctance to appoint a woman as chief steward since that would have been a highly probable result of following the normal practice of hiring from within.

The fact that women were in fact being hired as full-time stewards does not refute the inference that sex played a factor in the decision to appoint Blake. It has often been the case that women are readily hired to fill positions in fields where the preference in managerial or supervisory positions has gone to men.

Neither am I persuaded by the evidence of Capnerhurst who testified that gender played no part in the Executive Committee decision of September 27 in which she participated. The evidence suggests that this meeting in fact engaged in little, if indeed any, discussion of the merits of either Blake or the Complainant as candidates. Thus, a preference for a man, as indicated by the decision, could easily have been an unspoken assumption that was not evident to this participant. Capnerhurst was the witness who appeared to feel most strongly that the Complainant had contributed to the resignation of Laforet. This may well have influenced her personally to support Blake without realizing that her colleagues on the Executive Committee were influenced by a gender bias.

LIABILITY OF THE INDIVIDUAL RESPONDENTS

Before I move on to the question of remedy, there is one other aspect of the question of liability that needs to be addressed. The individuals who actually carried out the hiring process, that is, the Respondent De Hart who was President at the time and the Respondent Fairbrother who was Chair of the Bar Committee, were named individually as Respondents to the complaint. The decision that I have found in violation of the Complainant's rights was made by the Executive Committee, for whose actions the Respondent Branch 594 is clearly responsible. Given the nature of the decision as a collective decision of the Executive Committee, it does not

necessarily follow that the Respondents De Hart and Fairbrother should be held personally liable for the decision.

There would be possible bases on which persons in the position of the Respondents De Hart and Fairbrother would be personally liable for their role in the decision of the Executive Committee or in carrying it out. This raises issues that were not argued before me.

There is some suggestion in the evidence that the Respondents De Hart and Fairbrother might have been motivators of the decision of the Executive Committee or might themselves have violated the rights of the Complainant in carrying it out. There is not, however, sufficient evidence of this on which I can base a finding that these individuals acted in such as way as to attract personal liability for the violation of the Complainant's rights. It is possible that they did, but it is also possible that their participation was no more than a good faith attempt to carry out the will of the Executive Committee without appreciating the discriminatory implications.

Consequently, I am unable to find that the Respondents De Hart and Fairbrother are personally liable for the violation of the Complainant's rights. The Complainant's remedy, therefore, lies solely against the Respondent Branch 594. In light of this, throughout the remainder of this decision I will refer to the Respondent Branch 594 simply as the Respondent.

LOST WAGES

As a remedy, the Complainant is claiming lost wages during the period from the end of September, 1988, until September 13, 1989 when she obtained permanent employment with Royal Canadian Legion Branch 143. In addition, she is claiming general damages flowing from the very fact that her rights were violated.

There is no question that, as a result of the violation of her rights, the Complainant suffered a loss of opportunity to be promoted from full-time steward to chief steward by the Respondent. The main difficulty which arises with respect to lost wages is whether, in the circumstances of this case, the remedy should be based on the entire wages lost as a result of the Complainant's unemployment when she resigned following the violation of her rights, or on the differential between the wages which the Complainant was earning as a full-time steward and those which she might have earned as chief steward. On the evidence before me, the Complainant was earning $7.50 an hour as a full-time steward when she resigned, while the wages of the chief steward were $9.00 an hour. Thus, the basis on which lost wages are calculated makes a substantial difference.

This question is part of the larger issue of mitigation which was raised on behalf of the Respondent. The duty to mitigate requires a claimant to act reasonably to diminish the loss. It does not entail taking the most reasonable course of action, but rather taking some course of action which is seen to be reasonable in the circumstances.

The Respondent questioned whether the Complainant could assert any claim in light of the duty to mitigate because the Commission led no evidence of the efforts of the Complainant to seek alternative employment. On the other hand, the Respondent, which bears an onus to show the avoidable consequences of its wrong, did not explore this issue either in its examination of the Complainant or in other evidence. The Commission did lead evidence that the Complainant had found alternative employment, albeit of a limited nature, during the period of her claim, and found permanent employment within a year. This supports an inference that she in fact sought such employment.

The Complainant testified, and it was not disputed by the witnesses on behalf of the Respondents, that she had asked the Respondent if she could return to work a week after her resignation. Thus, the Respondent had it within its own power to reduce the loss and declined to do so. Moreover, the Respondent led no evidence as to the availability of alternative employment. In so far, therefore, as the duty to mitigate means that a claimant of lost wages must take reasonable efforts to find alternative employment, I conclude that the Complainant acted reasonably.

This leaves, however, the question of whether the Complainant's initial action in resigning gave rise to a loss for which the Respondent is responsible. The resignation was on the Complainant's initiative. The Respondent took no action intended to induce this resignation. On the contrary, its first reaction was that it wanted the Complainant to continue her existing employment.

Circumstances are easily conceivable in which a violation of a person's rights under the Human Rights Code would justify that person in resigning and claiming damages for the resulting loss of employment. The obvious example is that of harassment: Lampman v. Photoflair Ltd. and Smith (Sept. 28, 1992), unreported (Ont. Board of Inquiry). Such a violation of the Code is likely to create a hostile environment which no person can reasonably be expected to endure. Thus, it is reasonable for a person in that position to terminate their employment and rely on their rights under the Code for compensation.

Moreover, it is arguable, although it is not before me for decision in this case, that any unequivocal violation of the Code might justify voluntary termination of employment and reliance on the claim for compensation. In such circumstances, the victim would in

effect be faced with agreeing to a clear violation of human rights as a condition of employment. It might be seen as reasonable for a person to resign, rather than accept this.

The situation here is not this simple. As already indicated in my discussion of the disputed direct evidence of discrimination, it is by no means clear that the Complainant initially saw the situation as one of gender discrimination. Since the Complainant's approach to the matter was anything but acquiescent, I remain puzzled as to why, if she perceived sex discrimination, this issue was not raised with the Respondent at an early stage. The evidence surrounding her resignation is just as consistent with a perception on her part that she was being passed over on the basis of personal favouritism. In light of the normal hiring practice of the Respondent, there is considerable potential for such favouritism in its hiring decisions.

Absent any involvement of the discriminatory factors listed in the Human Rights Code, personal favouritism would not be unlawful. Thus, it would not be reasonable for the Complainant to resign and expect compensation if favouritism was all that was involved in the decision not to promote her to chief steward.

While the question is a close one since the Complainant may, correctly, have sensed that she was a victim of sex discrimination at an early stage, I am unable to find that this was the case. I am persuaded that she came to this realization only upon later reflection. In this light, given that the situation was ambiguous, I conclude that it was not reasonable for her to resign, as she did, without further exploration of the circumstances. In light of this, the loss of her wages as a full-time steward was the consequence of her own action and served to needlessly increase the loss. This was contrary to the duty to act reasonably to minimize the loss.

If I was persuaded that the Complainant had made some reasonable effort to obtain clarification of the reasons she was not considered for the position of chief steward and, based on the information provided, or the lack thereof, had reasonably concluded that gender discrimination was a condition of employment being imposed by the Respondent, I might well find that her resignation was justified. The evidence, however, indicates that the Complainant acted impulsively. She admitted that she asked no further questions once she ascertained that the position of chief steward was being discussed with Blake.

I recognize that it is accepted as a matter of employment law that an employee may announce a resignation as an act of frustration without a real intention to resign, and that such a resignation is not binding if the employer is made aware of the real intention in a timely fashion. What is timely, however, depends on all the circumstances. Although the Complainant acted impulsively, the

evidence suggests that, even at the outset, she still had a real intention to resign.

In any event, considering the nature of the employment relationship, I think timeliness required rather prompt action by the Complainant to set the record straight if she did not really intend to resign. The limit may well have been reached when the Respondent called her the next day and gave her the opportunity to withdraw her resignation. Even if that was insufficient time, I think the week that expired before the Complainant herself took some initiative was too long. Thus, if she really had no intention to resign, the Complainant did not act in a timely fashion to make this known to the Respondent.

The question arises as to whether, when the Complainant asked to resume her employment a week after her resignation, the refusal of the Respondent to re-employ her rendered it liable for the loss which she continued to suffer thereafter. Depending on the circumstances, such a refusal could amount to an adoption by the employer of the consequences of the employee's resignation, for example, if it involved a reaffirmation of the original discriminatory action.

The evidence indicates that the precipitous resignation of the Complainant placed the Respondent in a very difficult situation in terms of meeting its commitments at the time. The Complainant must have been aware of such commitments. Indeed it seems likely that part of her motive in resigning as she did was to make things difficult for the Respondent in this way.

I am satisfied that the subsequent decision of the Respondent not to rehire the Complainant was based entirely on this act of disloyalty by the Complainant and the corresponding undertakings that had been given in the meantime to other employees in terms of full-time employment. I do not think gender was a factor in this decision. Hence, I do not find this a discriminatory act or reaffirmation of the original discrimination. Consequently, the refusal to rehire does not render the Respondent liable for the loss of wages to the Complainant beyond the extent to which it was already responsible on the basis of its original denial of the opportunity to be promoted to chief steward.

LOSS OF OPPORTUNITY FOR PROMOTION

The loss of opportunity for a promotion to chief steward, on the other hand, was the direct result of the Respondent's discriminatory action for which it was solely responsible. This is a loss for which the Complainant is entitled to compensation based on the differential between the wage rate for the full-time steward's position and the position of chief steward, that is, $1.50 an hour. While this amount might perhaps be discounted

because this was only an opportunity, not a certainty, the Respondent, by its own failure to consider the merits of the Complainant for the position, foreclosed any evidence on which an appropriate discount might be assessed. It is proper, therefore, to award the full value of the loss of the pay differential.

The evidence indicates that all stewards worked 145 hours in each four week period. The period of loss was 50 weeks. The hours per week varied in that every fourth week was a 25 hour week. The evidence does not, therefore, enable me to determine exactly the amount of this loss but, given the amount involved, it seems fair to proceed as on the basis of the average hours worked per week. On this basis, I award $2,718.75 for loss of the opportunity for promotion.

While the Complainant found some part-time employment during the period of this loss, this constituted replacement of the income lost as a result of her resignation which is not being compensated. There is no reason to offset this against the loss of opportunity for a promotion.

GENERAL DAMAGES

The other head of loss to be considered is that of general damages flowing from the violation itself. There is some question whether this type of loss, given its intangible nature, really falls into the category of mental anguish. Under s. 41(1)(b) of the Human Rights Code, the violation must have been wilful or reckless for compensation to be awarded for mental anguish. There is little evidence that would support a finding in this case that the violation was wilful or reckless, rather it appears to have been merely careless.

The facts of this case, however, well illustrate the possibility of a real loss being suffered from the violation apart from the tangible financial or material losses flowing directly from the violation. Although I have concluded that the Complainant failed to act reasonably in the circumstances by resigning, it is nonetheless true that the violation of the Complainant's rights under the Human Rights Code triggered this. Discrimination, even if it is not immediately appreciated by the victim, tends to have deleterious effects of this nature. This is a compensable loss, independently of any question of mental anguish.

The amount of this type of loss is, of course, impossible to calculate in any scientific way. While it might be argued in a case such as this one that it could be measured by a provable related loss, for example, the loss of wages flowing from the unreasonable action the Complainant was induced to take, that would be awarding indirectly the loss of wages which I have already found to be inappropriate. The relevancy of this loss is, not that this

is a measure of the intangible loss flowing from the act of discrimination, but that this demonstrates such losses are not just a variant of mental anguish.

I note that the actual loss of wages suffered by the Complainant as result of her reaction to what turned out to be a violation of her rights under the Human Rights Code would be in excess of $13,000.00, even after offsetting her other earnings during this period. Although the Complainant's own impulsive action contributed largely to causing this particular loss, discrimination contrary to the Human Rights Code makes its victims vulnerable to this type of loss. In addition, this loss of wages is not necessarily the full extent of the consequences of the violation, still leaving aside mental anguish. Therefore, I find the figure of $5,000.00 claimed by the Commission to be a reasonable, if not modest, figure to place on this head of loss. I award that amount.

INTEREST

This brings me finally to interest. The Respondent argued that interest should not be awarded on account of the delay between the complaint in this matter, which was initiated on February 15, 1989, and the date of the hearing on February 15-16, 1993. While it is certainly a cause for concern that a case as relatively straightforward as this one should take four years to complete, this is not relevant to the question of interest.

Interest on an award is compensation to the Complainant for being out of the money awarded for the period between the loss and the award. Conversely, the Respondent has had, at least notionally, the use of this money for the same period. Thus, the Respondent suffers no loss or prejudice by the award of interest. While there may in reality be a financial burden on a Respondent if it has not made provision for its potential liability in such a case, the Respondent has the choice of whether to incur this risk or to cover itself by making provision for the potential liability as soon as it arises.

As to the amount of interest, it is appropriate to follow the guidelines with respect to interest under the Courts of Justice Act, R.S.O. 1990, c. C.43, even though these are not binding on a Board of Inquiry under the Human Rights Code. If applied strictly, this would involve a slightly complicated calculation since the compensation for loss of opportunity would involve an accruing amount. Since the amount involved is small, and the accrual ended on September 12, 1989, I will award interest on this amount only after that date. On the other hand, it is a simple matter to calculate interest on the award for general damages for the full period from notification of the claim. Since notification was apparently carried out by letter posted on March 10, 1989, I will apply interest from March 15, 1989.

The prima facie rate of interest on this basis under the Courts of Justice Act would be 13%, but the average rate over the intervening period is closer to 11.75%. In light of the declining trend in interest rates over the last couple of years, I think 11.75% is an appropriate rate to apply instead of the prima facie rate.

This results in interest on the award for loss of opportunity in the amount of $1,091.46 and on the award for general damages in the amount of $2,301.04 or a total of $3,392.50. The Complainant is also entitled to interest from the date of this decision on the same basis as if it were a court judgment under the Courts of Justice Act.

An order based on this decision is attached.

DATED at Windsor, Ontario.
26th February 1993

Robert W. Kerr
Board of Inquiry

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE,
R.S.O. 1990, c. H.19, as amended, and

IN THE MATTER OF THE COMPLAINT OF Laura J. Cunningham
AGAINST the Royal Canadian Legion Branch 594,
Bill De Hart, and Larry Fairbrother
dated February 15, 1989, alleging
discrimination in employment on the basis of sex.

BETWEEN

LAURA J. CUNNINGHAM,
Complainant,

and

ROYAL CANADIAN LEGION BRANCH 594,
BILL DE HART, and
LARRY FAIRBROTHER,
Respondents,

and

ONTARIO HUMAN RIGHTS COMMISSION,
Commission.

BEFORE: Robert W. Kerr, Chair,
Board of Inquiry

ORDER

Whereas the Respondent Royal Canadian Legion Branch 594 is found to have discriminated against the Complainant on the ground of sex contrary to the Ontario Human Rights Code and in consequence the Complainant suffered loss in the amounts stated in the specific provisions of this order;

IT IS ORDERED:

1. THAT the Respondent Royal Canadian Legion Branch 594 pay the Complainant the amount of $2,718.75 for loss of the opportunity for promotion for the period from September 29, 1988 through September 12, 1989.

2. THAT the Respondent Royal Canadian Legion Branch 594 pay the Complainant the amount of pay of $5,000.00 for general damages.

3. THAT the Respondent Royal Canadian Legion Branch 594 pay the Complainant the amount of $3,392.50 as interest on the amount for loss of opportunity for the period from September 13, 1989 through

February 14, 1993 and on the amount of general damages for the period from March 15, 1989 through February 14, 1993.

4. THAT the Respondents pay interest on the total of the amounts set out in paragraphs 1, 2, and 3, from the date of this decision until payment of these amounts, at the rate of interest that would ordinarily be applicable if this were a court order under the Courts of Justice Act.

DATED at Windsor, Ontario.
26th February 1993

Robert W. Kerr
Board of Inquiry